United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING

74-1708

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DAVID DE MATTEIS,

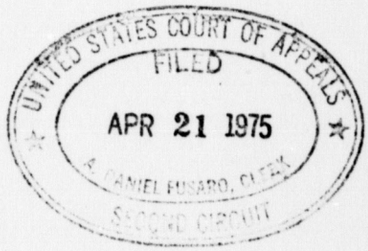
Plaintiff-Appellant,

-vs-

EASTMAN KODAK COMPANY,

Defendant-Appellee.

CIV 74-1708



DEFENDANT-APPELLEE'S
REPLY TO PLAINTIFF-
APPELLANT'S PETITION
FOR REHEARING

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 74-1708

DAVID DE MATTEIS,

Plaintiff-Appellant,

-vs-

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Defendant-Appellee.

REPLY TO PLAINTIFF-APPELLANT'S PETITION FOR REHEARING

PRELIMINARY STATEMENT

This reply is supplemental to Appellee's brief filed upon initial hearing of this appeal. Appellee specifically refers the Court's attention to the "Facts" and "Point I" of its brief to this Court and the authorities cited therein.

ARGUMENT

POINT I

APPELLANT'S PETITION FOR REHEARING FAILS TO ALLEGE SUFFICIENT GROUND FOR REHEARING

The crux of appellant's petition for rehearing, as supported by the United States Equal Employment Opportunities Commission (hereinafter EEOC), is that the EEOC letter received by appellant on May 8, 1973 did not say, in so many words that his complaint had been "dismissed". (Appellant also makes a feeble argument, in spite of this Court's prior decision, that a "right to sue letter" is required in a dismissal case.)

Appellee submits that, once again, appellant, now joined by the EEOC, is attempting to bootstrap his way into Court by exalting form over substance.

Appellant's argument that he did not know of his Title VII rights on or shortly after May 8, 1973 ignores the following facts:

1. Appellant received the EEOC's letter entitled "Determination" on May 8, 1973. (This letter was attached to appellee's motion to dismiss appellant's complaint before the District Court as Exhibit "B" thereto and appears at pp. 23-30 of the Appendix.)

2. The "Determination" letter, in its first paragraph, specifically referred to 29 CFR §1601.19b.

3. At page 7 of the "Determination" letter, the EEOC specifically informed appellant that "This determination concludes the Commission's processing of subject complaint."

4. Prior to the expiration of ninety days from May 8, 1973, appellant retained private counsel (P-D, p.17).[1]

[1]References to plaintiff's exhibits before the District Court are "P-A", "P-B", etc. Page references, unless otherwise noted, are to the Appendix.

5. 29 CFR §1601.19b, in relevant part, states:

> §1601.19b Determination as to reasonable cause.
>
> (a) If the Commission determines that a charge fails to state a valid claim for relief under title VII, or that there is not reasonable cause to believe that a charge is true, the Commission shall dismiss the charge. Where, however, it determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, it shall endeavor to eliminate such practice by informal methods of conference, conciliation, and persuasion.
>
> (b) The Commission shall promptly notify the aggrieved person, the person making a charge on behalf of such person, where applicable, and the respondent, or, in the the case of a charge filed under §1601.10, the person aggrieved, if known, and the respondent of its determination under paragraph (a) of this section. The determination is final when issued; therefore, requests for reconsideration will not be granted. The Commission may, however, on its own motion, reconsider its determination at any time and, when it does so, the Commission shall promptly notify the aggrieved person, the person making the charge on behalf of the aggrieved person, where applicable, and the respondent, or, in the case of a charge filed under §1601.10, the person aggrieved, if known, and the respondent of its intention to reconsider its determination, and of its subsequent decision on reconsideration.

6. Title VII, in relevant part, clearly states:

> ***If a charge filed with the Commission pursuant to section (b) of this section is dismissed by the Commission***the Commission ***shall so notify the person aggrieved and within 90 days after the giving of such notice a civil action may be brought against the respondent named in the charge***by the person claiming to be aggrieved***. 42 U.S.C. §2000(e)-5(f)(1).

There should be no question, then, that regardless of what the EEOC's May 8 letter to appellant stated, appellant's counsel should have been able to do the following:

1. Read the regulation cited by the EEOC at the beginning of its "determination" dated May 8 (pp. 23-30).

2. Read 29 CFR §1601.19b and realize that § 1601.19b gives the EEOC only two options, i.e. determine that a charge states "reasonable cause" or that it does not.

3. Read the EEOC's "determination" which can lead to only one conclusion: that the EEOC did not find that appellant's claim stated "reasonable cause".

4. Read the last paragraph of the EEOC's determination which explicitly stated that the EEOC had concluded its processing of the complaint.

5. Conclude that appellant's charge had been dismissed.

Certainly, from the determination alone, appellant or his attorney had notice that his charge had been dismissed.

Although the EEOC contends that there is some middle ground between dismissal and a finding of reasonable cause, its argument is not supported either by the statute or the EEOC's regulations. The EEOC can determine only that there is reasonable cause to support a charge or it must dismiss the charge. There is no third alternative. The EEOC dismissed appellant's charge and told him why it did so.

Therefore, the Court should reject the EEOC's plea of "mea culpa" and deny appellant's rehearing. Appellant, or at least his counsel, certainly were on notice within 90 days

of May 8, 1973, that the EEOC had not found "reasonable cause" and was going to take no further action on his charge.

POINT II

THIS COURT CORRECTLY DETERMINED THAT NO RIGHT TO SUE LETTER WAS NECESSARY IN THIS CASE

Although the EEOC attempts to re-argue that a right to sue letter is necessary in dismissal cases before a claimant can file a Title VII action, its arguments make no more sense now than did appellant's identical arguments already rejected by this Court.

There was no attempt at conciliation in appellant's case, nor was there any need for any. The EEOC dismissed appellant's charge.

Nonetheless, at page 6 of its memorandum, the EEOC argues:

> Read together, then, the regulations (29 CFR §§1601.19b and 1601.25b) provide that, after a no cause decision, the Commission may issue a formal suit letter at any time, but if it has not done so when the charging party wishes to commence legal proceedings, he may request such a notice and it will issue promptly.

As this Court correctly pointed out, such a reading of the regulations requires the following:

1. That the reader ignore the fact that 29 CFR §1601.25b applies only to charges that are conciliated.

2. That the reader ignore the clear language of 42 USC §2000(e)-5(f)(1).

The EEOC asserts that appellant's counsel was reasonable in waiting to request a right to sue letter. It is submitted that requesting a right to sue letter after dismissal of a charge is reasonable only if the Court can accept the propositions:

1. That a competent attorney would ignore the clear language of 29 CFR §1601.19.

2. That an attorney would ignore the language of the statute.

3. And, rather than relying on these two provisions, wade through the convoluted language of §1601.19b on one hand while balancing the equally convoluted language of §1601.25b in the other hand.

Appellee submits that it is much more reasonable to assume that an attorney would follow the statute and 29 CFR §1601.19.

Regardless of the weight to be given to the EEOC's regulations, this Court should not sanction the assumption that it is reasonable for an attorney to ignore the language of a statute that is as clear as 42 USC §2000(e)-5(f)(1).

POINT III

THIS COURT'S DECISION AS TO THIS APPELLANT SHOULD STAND

The EEOC argues that this Court should allow a bulge in the jurisdiction of the federal courts, citing Huson v. Chevron Oil, 404 US 97 (1971). The EEOC's argument should be rejected.

Huson was an action brought upon the Lands Act, 43 USC §1333. The statute therein set forth no explicit jurisdictional time limit for filing an action thereunder. Upon long standing precedent, plaintiff filed a personal injury action. After filing, but before trial, the long standing precedent upon which plaintiff relied was reversed. The Supreme Court permitted the action to go forward. The contrast to appellant's action is striking:

1. Long standing precedent established that timely filing is a jurisdictional necessity in Title VII actions. (See authorities cited in appellant's brief to the Court.)

2. Title VII on its face clearly sets forth the statutory filing period.

3. Title VII, on its face, clearly states that the filing period begins to run upon notice of dismissal of a charge.

There was no long standing precedent that dismissal of a charge did not begin to run the time to file an action in federal court. Appellant could not have relied on any such notion. Moreover, because of the clarity of the statute, the resolution

of appellant's case, even if it were one of first impression, was "clearly foreshadowed". Since appellant cannot meet the first test of Huson, this Court need not go further into the EEOC's arguments. Jordon v. Weaver, 472 F2d 985 (7th Cir. 1973).

Moreover, it must be emphasized that appellant's action faced a jurisdictional defect, an issue which was not clearly decided in Huson.

The EEOC attempts to load its plea on behalf of appellant with further spurious arguments.

For example, the EEOC argues on behalf of unnamed and unknown claimants who may be affected by the Court's decision, citing the policy of Title VII and its purpose of aiding those without counsel. Appellant had counsel. Moreover, the EEOC argues that others may not have a 42 USC §1981 claim. But, at this juncture, appellant has a §1981 claim.

And, although a claimant's rights under Title VII may have to be zealously protected, not only have appellant's rights been more than protected (apparently appellee has none) but also zealous protection does not go to agency or judicial extension of Federal Court jurisdiction established by Congress. As set forth in appellee's earlier brief to this Court, Congress explicitly stated, and re-emphasized in the 1972 amendments to Title VII, that complainants had to file a Title VII lawsuit within 90 days of receipt of notice that their EEOC charge was dismissed.

POINT IV

APPELLANT HAS A RIGHT OF ACTION AGAINST HIS COUNSEL

Appellant retained private counsel well within the jurisdictional filing period. As set forth above, counsel should have been able to read the statute and regulations and conclude that the time to file suit was running.

Moreover, counsel has been less than diligent throughout the progress of this action.

Appellee included the EEOC letter it received with its motion papers before the District Court. This letter clearly stated that appellant's charge had been dismissed on May 7, 1973 (D-A, p.23). Nonetheless, appellant's counsel did not inform the District Court of the EEOC letter he now claims he received.

Appellant appealed to this Court. Appellee served its brief which again specifically referred to the EEOC letter it received. Again, appellant made no suggestion in his brief that he received a different letter.

Appellant, by counsel, then appeared before this Court. Upon questioning from the Panel, not only did counsel not mention the "new letter", but, in fact, admitted that appellant received the same letter as did appellee.

Appellant's complaint seeks only monetary damages. His remedy for any damages he may suffer because of the failure

of his Title VII claim should be against his privately retained counsel.

If appellant has been damaged by his failure to timely file his Title VII claim, his damage has not been because of appellee. Yet appellee is asked to answer for this damage and must relitigate this case upon a letter counsel must have known existed long before appellant's petition for rehearing, but which was never offered to the Courts.

POINT V

THE EEOC SHOULD NOT BE "A FRIEND OF THE COURT"

Although appellee respectfully recognizes the Court's right to grant the EEOC the status of amicus curiae with respect to appellant's petition for rehearing, appellee can only wonder at the application of the lofty and long respected title of "friend of the Court" to the EEOC.

At the outset, the EEOC knowingly sent different letters to appellant and appellee. The letter sent to appellee included the magic word "dismissed" with reference to appellant's EEOC charge, so that it is settled that the EEOC dismissed appellant's charge (although the EEOC is now trying to argue that it did not dismiss the charge). Nonetheless, the EEOC sent a different letter to appellant, apparently hoping to set up the very arguments it now

makes before this Court.

Although the EEOC now argues that its duplicity in sending appellant a letter that was different from that which it sent appellee is enough to give appellant three days in Court, it was not satisfied in its efforts to extend the District Court's jurisdiction. The EEOC admits, at page 5 of its memorandum to this Court, that 13 days after May 8, 1973 it began sending formal suit letters when it dismissed charges. Nonetheless, it did not do so in appellant's case. Appellant received his right to sue letter on or about July 26, not May 25, 1973.

Based upon these two instances of its willful disregard to comply with its statutory duties to all parties which it now argues in support of appellant's petition, the EEOC's participation in appellant's petition as amicus curiae is remarkably inappropriate.

CONCLUSION

THE PETITION FOR REHEARING
SHOULD BE DENIED

Dated: April 17, 1975

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April 17, 1975

The Honorable A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

RE: DeMatteis vs. Eastman Kodak Company
Docket No. 74-1708

Dear Sir:

Enclosed are twenty-five copies of Defendant-Appellee's Reply to Plaintiff-Appellant's Petition For Rehearing. I have this day, served two copies of the same to each of the following:

(1) Joan de R. O'Byrne
25 East Main Street
Rochester, New York 14614

(2) Jack Greenberg and Deborah M. Greenberg
10 Columbus Circle
New York, New York 10019

(3) United States Equal Employment
Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

Beatrice Rosenberg, Charles L. Reischel,
and Gerald D. Letwin, Attorneys

All service was made by mailing said copies to said counsel by enclosing them in a postage paid wrapper directed to the above addresses.

Very truly yours,

James H. Morgenstern

JHM/ljd
Enclosures